SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of WABASH RAILWAY COMPANY, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.

BRIEF

Of Respondent Central Hanover Bank and Trust Company, as Trustee Under First Mortgage of Wabash Railroad Company Dated May 1, 1889.

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PRELIMINARY STATEMENT.

We understand that the Court's order granting the petition for certiorari limited the Court's review to the "question of the right of petitioner to intervene in order to assert priority." In preparing our statement of the case and the argument which follows, we have confined both statement and argument to matters which we deem to be relevant to the issue.

STATEMENT OF THE CASE.

The petitioner, Peter J. Carpenter, originally appealed to the Circuit Court of Appeals for the Eighth Circuit from an order entered by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri on August 31, 1938, by which the District Court denied petitioner's (appellant's) petition for leave to file an intervening petition in the cause (Rec. p. 84).

The petition was styled "Petition of Peter J. Carpenter for an Order Terminating the Receivership of Wabash Railway Company and dissolving the Temporary Restraining Order and Injunction" (Rec. p. 51). This petition, together with an original application for leave to file the same, were first filed in the District Court of the United States in which the receivership was pending, on January 26, 1938 (Rec. p. 47).

The application and petition were therefore filed long after the first appointment of Receivers in the cause, which was made on December 1, 1931 (Rec. p. 14). The original appointment of Receivers was made on a Bill of Complaint filed by the T. J. Moss Tie Company, a general creditor of the Wabash Railway Company. The Receivers appointed on this creditor's bill, and later their successors, Messrs. Frank C. Nicodemus, Jr., and Norman B. Pitcairn, who were appointed on October 19, 1933 (Rec. p. 33), continued the operation of the properties of the Wabash Railway Company until March 1, 1937. At that time the Chase National Bank of the City of New York, as Trustee under the Refunding and General Mortgage of the Wabash Railway Company, was granted leave to file a Bill of Foreclosure. The foreclosure cause was consolidated with the original equity receivership and Messrs. Nicodemus, Jr.,

and Pitcairn were appointed as Receivers in the Consolidated Cause.

Later, on November 1, 1937, this respondent, the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, filed a Bill of Complaint, which was thereafter consolidated with the prior causes. The Receivers formerly appointed in the cause were appointed as Receivers in the Consolidated Cause upon the Bill of Complaint of the Central Hanover Bank and Trust Company, and were directed to segregate and sequester the income, rents, tolls and profits from the properties subject to the said First Mortgage for the benefit of the First Mortgage Bondholders (Rec. pp. 43, 44).

The claimant, Peter J. Carpenter, has been represented by experienced counsel at all times and has been familiar with the existence of the receivership proceedings, and has had notice thereof at least since the 1st day of July, 1932. On that day he had filed a claim before Honorable Forrest C. Donnell, Special Master, who had been appointed by the District Court in the receivership cause as a Special Master to hear claims which might be filed in the receivership cause against the Wabash Railway Company (Rec. p. 102).

On August 25, 1935, the claim which the petitioner had filed came on for hearing before the Honorable Forrest C. Donnell, Special Master. Claimant appeared by his counsel, Roberts P. Elam, Esq. Mr. Elam offered in evidence the certified copy of the judgment of the Circuit Court of the City of St. Louis, Missouri (Rec. pp. 103, 104). This was a judgment in the amount of $10,000.00 entered on remand by the Circuit Court of the City of St. Louis, Missouri, after the sum of $5,000.00 had been remitted from the original judgment rendered in favor of claimant on the 13th day of February, 1931. Counsel likewise was

granted leave to offer in evidence at a later date the bill for costs accrued in the trial of the cause of "Peter J. Carpenter vs. Wabash Railway Company." No further evidence was offered.

The Special Master inquired of Mr. Fauser (counsel for the Receivers): "Any objection to either of these offers, Mr. Fauser?" and counsel responded: "No, we agree, further, that the claim be allowed as set out in the judgment." Counsel for the claimant in no way dissented from this statement. Following this statement, together with a statement by counsel for the Reconstruction Finance Corporation, the Special Master announced the following:

> "The Special Master: On this 6th day of January, 1936, there being present Roberts P. Elam, attorney for claimant, the Special Master determined that, pursuant to bill of costs, being attached and marked 'Exhibit B,' hitherto presented to the Special Master by counsel for claimant in the above matter, the court costs hereinbefore referred to are hereby determined to be the sum of $104.15, wherefore, the Special Master determines that he shall report to the Court,
>
> "(a) That said claim, to the extent of $10,000.00 principal, plus $104.15 court costs, plus interest on said principal amount of $10,000.00, at the rate of 6 per cent per annum from February 13, 1931, to December 1, 1931, is correct and valid, and should be allowed in the aggregate of the said principal sum, court costs and interest, as a general unsecured claim, and that judgment should be entered thereon in the above-entitled cause in favor of said claimant, Peter J. Carpenter, and against defendant Wabash Railway Company, in said aggregate amount;
>
> "(b) That said claim is not entitled to any lien or to any priority over other general unsecured claims.
>
> Forrest C. Donnell,
> Special Master."

No objection to or dissent from this statement by the Special Master was voiced by counsel for the petitioner, Peter J. Carpenter, who was present throughout the hearing (Rec. pp. 103-108).

The order appointing Forrest C. Donnell as Special Master provided that "all claims, interpleas, intervening petitions, or other petitions hereafter filed in this cause, by which the claimant, interpleader, intervenor, or other pleader seeks to recover any money or property from the Receivers appointed in this cause out of the estate in their hands, are hereby referred to him for his investigations, determination and report." The order of appointment further provided that "before settling his report in any contested case the Special Master should give the parties in interest reasonable notice of the time when and the place where he will finally settle such report and of the fact that they may desire."

Since the claim of Peter J. Carpenter had been allowed by consent at the hearing on August 26, 1935, and since there had been no dissent by any party, from the Receivers' announcement that the claim might be allowed as a general unsecured claim, the Special Master, evidently concluding that the claim was not a contested claim, filed his report allowing same as a general unsecured claim without further notice. The report was so filed on March 7, 1936 (Rec. p. 105), and no objection to the report as filed was made by the petitioner, Peter J. Carpenter, until the filing of petitioner's present application for leave to intervene in January, 1938, after an interval of nearly two years.

The petition for leave to intervene did not pray for the allowance of petitioner's claim as a preferred claim, nor did it ask that petitioner be allowed to intervene for the purpose of asserting any right of priority on behalf of petitioner's claim. On the contrary, the prayer of the

intervening petition was for four things: (1) The discharge of Messrs. Nicodemus and Pitcairn as Receivers of the Wabash Railway Company; (2) the termination of the receivership of the Wabash Railway Company and the discharge of the property of the Wabash Railway Company from receivership; (3) that the restraining order which had enjoined persons from interfering with the Receivers' possession of the property of the Railway Company be dissolved; and (4) that the Court, if it deem the same proper, grant the Railway Company thirty days within which to institute proceedings under Section 77 of the Bankruptcy Act.

As grounds for the relief prayed for the petition alleged in substance that petitioner, an employee of the Wabash Railway Company, had been injured on February 13, 1931, while working in the course of his employment, and, further set forth the facts with reference to the rendition of a final judgment in petitioner's favor in the amount of $10,000.00 damages for personal injuries so received. The petition asserted that the judgment was a lien upon the real property owned by the Wabash Railway Company and located in the City of St. Louis, Missouri, which was alleged to be of a reasonable value of more than $800,000.00.

The petition then asserted that the firm of Kuhn, Loeb & Company, as the bankers for the Pennsylvania Railroad Company, had obtained control of the Wabash Railway Company, and through such control had elected officers to the presidency and board of directors of the Wabash Railway Company, and had thereby caused the Railway Company to purchase the stock of the Lehigh Valley Railroad Company, and to lose substantial sums of money as the result of such purchases. The petition further alleged that in the year 1927 the Pennsylvania Railroad Company had acquired and still owned 48 per cent of the

voting stock of the Wabash Railway Company, but had acquired such stock control without the permission of the Interstate Commerce Commission, and that through such stock control the Pennsylvania Railroad Company had obtained the appointment of Receivers in the cause. It was further asserted that the insolvency of the Wabash Railway Company was caused by the purchase of Lehigh Valley stock, which was alleged to have been induced by the control of the Pennsylvania Railroad Company. The petition further alleged that although these wrongs were well known to the Receivers of the Wabash Railway Company, for more than six years they had refrained from taking any action to recover damages alleged by petitioner to have been sustained thereby.

Petitioner further alleged that the appointment of Receivers and the entry of the customary order in connection with the appointment restraining the collection of judgments pending the receivership proceedings, were in effect an injunction against petitioner's proceeding to enforce the alleged lien of his judgment; that pending the receivership proceedings the Receivers had derived considerable income from the operation of properties subject to the alleged lien of petitioner's judgment in the City of St. Louis and elsewhere, and that the Receivers had paid out as and for interest on bonds secured by the First Mortgage of the Wabash Railway Company, and other underlying bonds, many millions of dollars from the earnings so derived.

Petitioner further alleged that a portion of the property of the Railway Company was located in the State of Indiana; and that under the decision of the Supreme Court of Indiana in **McCullough et al. v. Union Traction Company of Indiana**, 206 Ind. 585, petitioner was entitled to a preference over the liens of the Mortgages of the Debtor's property as to real estate and improvements of the Rail-

way Company located in the State of Indiana. The petition further alleged that the receivership in the cause had been unduly prolonged and the Court recognized such fact when the Court ordered and directed, on April 19, 1937, that the Receivers file a plan of reorganization in the event that one was not filed by security holders within sixty days thereafter.

Petitioner also alleged the existence and enactment of Section 77 of the Federal Bankruptcy Act. (The allegation referred to the amendment of August 27, 1935—C. 774, 49 Stat. 911, 11 U. S. C. A. 205 (n), which was then in force and effect.)

Petitioner asserted that Section 77 provided a superior and more efficient method of reorganization for insolvent railroad companies, and further alleged that under the terms of said Section 77 a right of preference was created in favor of personal injury claims such as those of petitioner.

Petitioner finally set forth in some detail the number of miles of railway lines operated by the Wabash Railway Company in various states in which its properties were located, and asserted that he brought the action on behalf of himself and others who held claims for personal injuries against the estate of the Wabash Railway Corporation.

In this language we have attempted to state the substance of petitioner's intervening petition. We have not attempted to restate all of the allegations contained in said petition, many of which appear to us to be inconsistent.

The District Court in its order denied leave to file the intervening petition. In its findings of fact and conclusions of law the Court based its denial upon four propositions: (a) The petition did not conform to the requirements of Equity Rule No. 37; (b) the status and classi-

fication of the appellant's claim as a general unsecured claim had been correctly and finally determined by the Special Master and the petitioner was estopped from asserting any preference and priority; (c) the intervening petition failed to state a cause of action in equity, and the granting of leave to file would merely encumber and delay the orderly processes of reorganization; and (d) the dismissal of the injunctive proceedings on the order of the Court would be of no benefit to the claimant because in any event the properties of the Railway Company would remain in the exclusive custody and control of the Court's Receivers.

The Circuit Court of Appeals affirmed the District Court's order and its opinion is reported in full in 103 Fed. (2d) 996, and appears in the Record at pages 125 to 135.

APPELLANT'S SPECIFICATIONS OF ERROR.

We desire under this heading to point out that the specifications of error, A, B, C, D and E (Petitioner's Brief, pp. 9 and 10), go entirely outside the limited scope of the review fixed in the cause by this Court's order which in granting petitioner's application for writ of certiorari and limited it to the "question of the right of petitioner to intervene in order to assert priority." We assume that neither citation of authority nor argument is necessary to support the proposition that the scope of review in this case is determined by the Court's order rather than the petitioner's attempted expansion thereof in his specifications of error.

ARGUMENT.

I.

No absolute right of intervention existed. Intervention was neither necessary nor indispensable to the enforcement of any substantive right of petitioner. The allowance of the intervention was therefore a question for the exercise of the sound discretion of the trial court and is not subject to review on appeal.

In our brief in opposition to the issuance of a writ of certiorari in this cause we pointed out (Resp. Brief pp. 4 to 7) that the fundamental question for decision on appeal by the Circuit Court of Appeals in its opinion rendered below was the question of whether the petitioner had an absolute right to intervene, or whether (as respondents contended below and the Circuit Court of Appeals for the Eighth Circuit held) the allowance or denial of the petition for leave to intervene was a matter addressed solely to the sound judicial discretion of the trial court and therefore not subject to review on appeal.

In order to determine whether an absolute right of intervention existed or whether the allowance of the intervention was merely discretionary, it was necessary for the Circuit Court of Appeals to examine the proceedings below with a view to determining whether an intervention as a party to the cause was necessary and indispensable to the protection of any substantive right of the petitioner.

The decision of this Court in **Credits Commutation Company v. United States**, 177 U. S. 311, 44 L. Ed. 783, is a leading case upon the subject and lays down the principles of law with reference to the allowance of interventions, which have been consistently followed by the federal courts since that time.

In that case a petition for leave to intervene as a party to a receivership action was denied. An appeal was perfected to the Circuit Court of Appeals, which dismissed the appeal on the ground that the denial of the intervention was not an appealable order. The Court stated the rule applicable as follows (l. c. 785):

> "When such action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief. The cases at bar, however, are not of that character."

These general principles have been followed by the federal courts consistently since that date and applied in the following cases, among others:

> Radford Iron Co., Inc., v. Appalachian Electric Power Co., 62 Fed. (2d) 940, Cert. Den. 289 U. S. 748, 77 L. Ed. 1494;

Gaines v. Clark, 275 Fed. 1017;
Elkins v. First National Bank, 43 Fed. (2d) 777, C. C. A. 4th;
Merriam v. Bryant, 36 Fed. (2d) 578, C. C. A. 9th;
Central Trust Co. v. Chicago, R. I. & P. Ry. Co., 218 Fed. 336, C. C. A. 2nd;
United States Trust Co. v. Chicago Terminal Ry. Co., 188 Fed. 292, C. C. A. 7th.

In order to determine whether the denial of an intervention would be a "practical denial of certain relief to which the intervener is entitled and which he can only obtain by intervention," it was necessary for the Circuit Court of Appeals to consider the nature of the receivership proceeding and the nature of the claims which petitioner sought to assert by intervention, and in the course of its consideration of these matters the Circuit Court of Appeals ruled upon the various subsidiary questions of law which are outlined in its opinion.

The record in the case shows quite plainly that an intervention was not indispensably necessary for the protection of petitioner's rights, for the simple reason that the orders entered by the District Court in the receivership proceedings which provided for the appointment of a Special Master and the hearing of claims by the Special Master furnished a full, adequate and complete remedy for the enforcement of petitioner's substantive rights without the necessity of any formal intervention as a party to the cause.

The trial court in its order appointing the Special Master (Rec. pp. 22, 23) authorized the Special Master to investigate, determine and report upon any and all claims against the receivership estate. No reason why petitioner could not have asserted any claim or preference to which he may have been entitled in and as a part of his claim filed before the Special Master has been suggested, either

in petitioner's brief filed in this court or the briefs filed below.

It is true that the petitioner's claim was a claim against the assets of the receivership estate which was being administered by the District Court. There is, however, no basis whatsoever for concluding that the substantive rights of the intervenor against the receivership estate could only be protected by a formal intervention as a party to the cause. The order appointing the Special Master was quite broad and all-inclusive in its terms. It authorized the Special Master to hear every type of claim, in the following manner:

> "All claims, interpleas, intervening petitions, or other petitions hereafter filed in this cause by which the claimant, interpleader, intervenor or other pleader seeks to recover any money or property from the receivers appointed in this cause out of the estate in their hands, are hereby referred to him for his investigation, determination and report" (Rec. p. 23).

After providing generally for the method of procedure before the Special Master the order gives a right of review in broad terms to any party who may be aggrieved by his decision by providing as follows (Rec. p. 23):

> "Before settling his report in any contested case, the Special Master shall give the parties in interest reasonable notice of the time when and the place where he will finally settle such report and of the fact that they may desire. Any party to such a cause, who feels aggrieved at the finding or decision of the Special Master may, at the time fixed by the Special Master for settling his report, file any such exceptions in writing to the same as may be deemed appropriate by such party, and no exceptions not so filed, will be considered by the Court. The Master will notify all parties interested in the matters presented by petitioners in such cases of such fact."

Under the terms of this order the petitioner had a simple, but full and adequate, remedy for the assertion of whatever claims of preference, if any, he was entitled to assert. There was no reason for allowing petitioner to encumber an already complicated proceeding by an intervention as a party to the cause when his substantive rights could have been sufficiently protected in a much simpler and more direct manner.

We need hardly call attention to the well-known fact that there are ordinarily a vast number of claims based both on contract and upon negligence for personal injuries outstanding against almost any large railroad system at the time of the appointment of receivers. When a large property in which there are many conflicting interests is administered and finally reorganized, the allowance of interventions which are really necessary will ordinarily result in a somewhat complex proceeding. If to the number of necessary interventions there is to be added the formal intervention of other parties whose rights may be sufficiently protected by the mere filing of a claim before the Special Master, the proceedings will become hopelessly encumbered and complicated and ultimate reorganization and discharge from receivership postponed even further.

It was for the purpose of allowing personal injury claimants a simpler remedy for the prosecution of their claims against the estate in receivership that the order appointing the Special Master was made. The practice is one that is common to nearly all receiverships or reorganizations and has grown up because it is a simple and efficient method for the adjudication of a vast number of claims. The claimant here had a full, adequate and complete remedy, and was properly denied the right to intervene because intervention was neither necessary nor indispensable to the protection of his rights.

The fact is that the petitioner had availed himself of

the procedure afforded by the District Court for the determination of the validity and priority of claims by filing his claim before the Special Master "on or prior to July 1, 1932 (Rec. p. 102). Claimant was then granted all the relief prayed for. His claim was allowed as a general unsecured claim in the face amount of the judgment, together with interest and court costs, in the presence of counsel for the petitioner (claimant), without any objection on the part of his counsel.

The Circuit Court of Appeals properly held that the petitioner, having once stipulated for the allowance of his claim as a general claim against the receivership estate, should not be entitled after the lapse of several years to change his position and come forward with belated assertions of a claim to a right of preference in payment. Assuming, however, for the sake of argument that petitioner is not barred from asserting a right of preference, it still does not follow that his intervening petition should have been granted, because in any event, any legal argument in support of a right of preference which petitioner desired to assert could have been set forth in an amended claim filed by leave of court, and the claimant still had an adequate and complete remedy available for the presentation of these issues at a hearing before the Special Master.

In any case, therefore, the denial of claimant's application for leave to intervene did not deprive claimant of any substantive right. He had an adequate and complete remedy open to him at all times. He refused to take advantage of it, but chose, instead, to attempt to encumber the proceedings by an unnecessary intervention as a party to the cause. The trial court's denial of his application was therefore a reasonable and proper exercise of judicial discretion, within the rule laid down by this Court in the **Credits Commutation Case**, and therefore was not subject to review in the Circuit Court of Appeals on appeal. The

Circuit Court of Appeals quite properly affirmed the order of the District Court.

II.

Under the record facts the trial court's denial of leave to file petitioner's intervening petition was a proper exercise of judicial discretion which was not subject to reversal on appeal.

Petitioner's intervening petition was not, we respectfully submit, a petition for leave to intervene in order to "assert a claim of preference" in the receivership proceedings. The terms of the petition summarized in our Statement of Facts, and set forth in full in the Record (Rec. pp. 51 to 77), indicate quite clearly that what petitioner sought was not to assert a right of preference in the receivership proceedings, but rather to secure the dismissal of the receivership proceedings and the discharge of the Receivers, so that petitioner might then proceed to enforce the alleged judgment lien which petitioner claimed, or so that the Railway Company might be forced into reorganization proceedings, in which event petitioner anticipated that he would have a right of preference under the terms of the Railroad Reorganization Act as it then stood.

It is true that petitioner did allege in paragraph 15 of his petition (Rec. p. 4) that he was entitled to a lien against the Missouri property of the Railway Company under the terms of his judgment, and did in paragraphs 17 and 18 thereof (Rec. p. 66) assert that under the law of the State of Indiana personal injury judgments were entitled to preference, and that his claim should be considered an operating expense, because such claims were classified as operating expense for accounting purposes under the regulations of the Interstate Commerce Com-

mission. However, these facts are not stated as a basis for the allowance of a preferred claim to the petition in this receivership proceeding. On the contrary, these facts are stated as a ground for petitioner's prayer that the Receivers be discharged and that the Railway Company be given thirty days within which to avail itself of the provisions of Section 77 of the Bankruptcy Act.

The petitioner's (Carpenter's) petition was therefore not a petition for leave to intervene in order to assert a right of preference, and in point of fact, as demonstrated under Point I, no intervention was necessary in order to assert or claim a right of preference. Petitioner sought leave to intervene in order to secure an order terminating the receivership and discharging the Receivers.

Assuming, however, contrary to the prayer for relief contained in the petition, that the intervention was sought in order to assert a right of preference, this certainly was not a sufficient ground for the allowance of an intervention, when the claim of preference could have been asserted equally well without so encumbering the proceedings. See **Elkins v. First National Bank of the City of New York**, 43 Fed. (2d) 777, where the Circuit Court of Appeals for the Fourth Circuit stated (l. c. 779):

> "There can be no question, we think, that the petition for intervention was properly denied. As originally presented, it amounted to no more than an application on the part of the petitioners to have themselves made parties to the receivership proceeding in order that they might determine a question as to priority in the allowance and payment of claims. A special master had been appointed to pass upon just such questions, and any claim of petitioners to priority or any objection to the claim of the bank should have been made before him. It is not the ordinary or the proper procedure in a receivership proceeding to allow claimants who can have their contro-

versies settled before a master with right of review by the court, to be made parties to the original cause and thus complicate the issues there involved. Acme White Lead and Color Works v. Republic Motor Truck Co. (D. C.), 285 F. 88; Jones & Laughlin v. Sands (C. C. A. 2d), 79 F. 913; Sands v. Greeley Co. (C. C.), 80 F. 195."

The balance of the petition consisted of allegations designed to show that the Wabash Railway Company, prior to receivership, had been caused to sustain various losses because of the alleged domination and control of the Pennsylvania Railroad Company, and further to show that the Receivers appointed in the cause were unfit persons to control the properties because of their alleged previous connection with the Pennsylvania Railroad Company. These allegations obviously had nothing to do with the existence or nonexistence of any right of preference on the part of the petitioner and were relevant only to petitioner's prayer for the discharge of the Receivers and the termination of the receivership proceedings.

The District Court in its conclusions of law found (Rec. p. 83) that "The granting of leave to file will merely serve to encumber and delay the orderly processes of these cases toward a reorganization of the properties of the defendant railway company." The Circuit Court of Appeals affirmed this finding of the District Court in the following language:

"The Consolidated Cause in which the receivers have been appointed includes bills for foreclosure and impounding of income, rents, issues and profits under the provisions of prior and primary mortgages. There are no allegations and no claim that such mortgages are invalid, nor that their holders or trustees are parties to the practices charged to be fraudulent and illegal in the petition sought to be filed by appellant. It is apparent, as found by the trial court, that the

dismissal of the injunctive orders and of those appointing the receivers would be of no aid to said petitioners without the dismissal of the several causes, and that to protect the prior lien holders in the rights and powers held and exercised by them, the properties of the defendant Railway Company must remain in the exclusive custody and control of the court's receivers. As indicated by conclusions of the trial court a reorganization is in process, and to the propriety of its terms when submitted objections may be entertained.

"In cases involving the complexity of this Consolidated Cause large discretion is lodged in the district court. In exercising its discretion the court should consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rules of Civil Procedure, 24 (b), 28 U. S. C. A., following section 723c. In denying the application to intervene we cannot say that discretion has been abused. Appellant has disclosed no legal interest as a claimant that has not already been recognized, and may not be realized in the orderly process without the drastic disorganization contemplated and prayed in the petition sought to be filed.

"The decree below accordingly is affirmed."

The record facts amply sustain the findings of the District Court and the opinion of the Circuit Court of Appeals in this regard. It appears (Rec. p. 38) that The Chase National Bank of the City of New York on March 1, 1937, filed its Bill of Foreclosure as Trustee under the Wabash Railroad Company Refunding and General Mortgage, and it further appears (Rec. pp. 43, 44) that a Bill of Complaint was filed on November 1, 1937, by the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage, and that pursuant to this Bill of Complaint the income from the property subject to the First Mortgage was segregated and sequestered for the benefit of the

First Mortgage Bondholders. Such actions are, as a matter of common knowledge, steps taken in the orderly reorganization of a railroad company. Although they amount to only a fragment of the record which was before the District Court when it entered its order, they indicate quite plainly the foundation for the District Court's conclusion that the appellant's petition should be denied, because it would result in an unnecessary interference with the orderly processes of reorganization of the Wabash Railway Company without any substantial benefit to appellant or anyone else.

In the exercise of its sound judicial discretion, the trial court was also entitled to take into consideration the fact that claimant, although represented by counsel at all times, and although he had notice of the proceedings at least as early as July 1, 1932, when his claim was filed (Rec. p. 102), made no effort to call to the attention of the trial court the matters set forth in his intervening petition for a period of about five and one-half years, or until January 26, 1938. Appellant appeared by counsel before the Special Master at the hearing on his claim on August 26, 1935, and made no claim of any right of preference. On the contrary, appellant through his counsel was present and voiced no objection when the Special Master announced that his claim would be allowed as a general unsecured claim for the full amount of the judgment, together with interest and costs. Finally, the appellant stood silently by for over a year after the report of the Special Master was filed, recommending that no priority be allowed to his claim.

During this period the Bill of Foreclosure was filed on behalf of the Chase National Bank of the City of New York, as Trustee under the Refunding and General Mortgage, Receivers were appointed and ancillary proceedings were taken in the other jurisdictions in which the railway

company's properties were located, and then later the Bill of Complaint of the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage, was filed and Receivers were appointed thereunder.

The granting of Carpenter's intervening petition, which was directed primarily at the discharge of the Receivers and the termination of the receivership, would have upset and rendered entirely useless every one of the steps which had been taken toward the reorganization of the Railway Company by the parties to the cause. The trial court was familiar with the detailed steps which had been taken in the proceedings and with knowledge of all these facts, and of the delay on the petitioner's part, denied him an intervention. Under such circumstances it should be clear that the laches of the petitioner were sufficient to cause a court of equity to deny him the relief prayed for irrespective of any other issue in the case.

III.

Neither the applicability nor the constitutional validity of the amendment to Subsection (n) of Section 77 of the Bankruptcy Act of August 11, 1939, can or should be determined by this Court on the present record. These questions should be determined when raised by a proper proceeding in which the relevant facts are before the Court.

Petitioner's brief calls attention to the enactment of the amendment to Subsection (n) of the Railroad Reorganization Act on August 11, 1939. The text of the amendatory act of Congress is correctly set forth in the appendix to petitioner's brief at page 29.

The case was considered by the Circuit Court of Appeals and its opinion rendered on May 13, 1939, prior to the enactment of the amendment. The intervening peti-

tion was originally filed in the District Court in January, 1938, and submitted to the District Court for decision on April 4, 1938, and the Court entered its order denying leave to file on August 31, 1938 (Rec. pp. 76, 77, 78).

Obviously, none of the parties to the cause anticipated the enactment of the amended section by Congress at the time the record was made and the cause was submitted to the District Court for decision.

The petitioner calls attention to decisions such as **United States v. Schooner Peggy, 1 Cranch. 103, 109; Dinsmore v. Southern Express Company et al.**, 183 U. S. 115, 120, and others, in support of the contention that the Court on appeal should take into consideration the provisions of this amendment and hold that petitioner is entitled to a right of preference thereunder, irrespective of the soundness of petitioner's contentions with regard to the existence of a right of preference prior to the amendment.

While it is doubtless true that the Court on appeal cannot exclude the amended section from its consideration because the amendment was enacted after the cause was tried and heard in the courts below, and while under the rule announced in these decisions petitioner is not deprived of whatever rights, if any, he may have under the terms of the amendment by reason of the fact that it was enacted after the trial below, none of these considerations justify the conclusion argued for by the petitioner.

Granting to the fullest extent that the fact that the amendment was enacted subsequent to the decision on petitioner's claim below does not deprive him of any rights to which he may be entitled under its terms, there still remains for decision the question of whether the amendment is or was intended by Congress to be applicable in terms to claims such as those of the petitioner, and the further question of whether, if applicable to the

petitioner's claims, the amendment does not conflict with the due process clause of the Fifth Amendment to the Constitution of the United States as applied to the particular facts in this case.

As a corollary to the proposition that petitioner loses no rights under the terms of the amendment because of its enactment after the decision below and during the pendency of the cause on appeal, it should follow that the respondents' rights to brief and argue the applicability and constitutionality of the amendment upon a record prepared for the purpose of properly presenting those issues should not be eliminated by the disposition of the cause on appeal.

The facts relevant to the determination of these questions are not shown by the present record. The record fails to show the date of issuance or the fact of recording or the specific property covered by the lien of any one of the Mortgages of the Railway Company's property. The record does not show the total amount of principal and interest due on the issues of bonds outstanding under the terms of the various Mortgages. (The only statement with regard to this matter is a statement of the principal amount of the bonds appearing in the Record at pages 6 and 7.)

The record does not show the date of default or the fact of the entry of the order sequestering and impounding income for the benefit of the holders of the First Mortgage Bonds, or the values of the mortgaged properties.

The record shows the fact that the claimant's claim was filed in 1932, and that it was allowed as a general unsecured claim in 1935. It indicates that proceedings looking toward a reorganization had been taken, but fails to show in any comprehensive detail at all the full extent of the proceedings taken toward reorganization in this case, or

the treatment to be afforded to claims such as petitioner's claim in the plans for reorganization.

The question of whether the amendment is by its terms applicable to a receivership which has been pending for a number of years prior to its enactment and to a claim the status of which had been determined prior to its enactment, should only be determined upon a record in which the facts relevant to these questions have been fully presented to the Court for consideration.

Further, the allegations and prayer for relief of the intervenor's petition are wholly inconsistent with any claim to a preference in the receivership proceedings under the terms of the amendment to subsection (n).

What the petition sought is the dismissal of the receivership proceedings so that the petitioner may proceed to enforce his alleged judgment rights by action, or may when a subsequent bankruptcy proceeding is instituted under Section 77 of the Bankruptcy Act avail himself of the preference created by the former section in bankruptcy proceedings alone. The amended section if applicable at all renders entirely futile and useless the relief prayed for in petitioner's intervening petition. If the amended section is valid, and if it is applicable to petitioner's claim, petitioner certainly has neither need for nor any occasion to urge the dismissal of the receivership proceedings, because his rights, if any, under the amended section can be fully asserted in the receivership proceedings.

The application of the amended section to petitioner's intervening petition or to the record established in this cause would be wholly incongruous. The issues which petitioner raised by his intervening petition were correctly decided against him by the Circuit Court of Appeals. When and if petitioner's rights under the amended section are before the Court for consideration in a proper

proceeding to which such questions are reasonably relevant, the nature, scope and validity of the amendment can be determined. Respondent, therefore, respectfully submits that the orders of the District Court and the Circuit Court of Appeals should be affirmed, and that the questions raised by the amendment to Subsection (n) should be reserved for decision until such time as they are properly before the Court.

Respectfully submitted,

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